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No. 98-1673

IN THE

Supreme Court of the United States

SMEDVIG TANKSHIPS, LTD., SMEDVIG TANKSHIPS (AGENCIES), LTD., SMEDVIG TANKSHIPS MANAGEMENT, LTD., SMEDVIG TANKSHIPS, A.S., A/K/A SMEDVIG TANKREDERI A.S., PEDER SMEDVIG, A.S., PEDER SMEDVIG SINGAPORE, PTE., LTD., K.S. SMEDVIG TANKERS V, AND K.S. SMEDVIG TANKERS VI,

Petitioners,

v.

NESTOR ABUAN, AS GUARDIAN ON BEHALF OF CARLOS VALDEZ,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

MOTION OF NORWEGIAN SHIPOWNERS' ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Norwegian Shipowner's Association respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petitioner's application for writ of certiorari. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The Norwegian Shipowners' Association is a trade group that represents 192 Shipowners operating 730 vessels on trade routes throughout the world. Over 48,000 foreign seamen are employed on vessels registered with the Association. A chief function of the Association is to negotiate wages and terms for employment contracts through collective bargaining agreements between shipowner members and the various labor organizations and governmental entities controlling the employment of these foreign seamen.

The collective bargaining agreement and associated employment contracts at issue in this case were the product of extensive negotiation between various Philippine and Norwegian interests, including the Association. The Association was responsible for drafting the collective bargaining agreement. Similar agreements exist with Polish, Russian, Indonesian, Pakistani, Central and South American, and Chinese labor interests. The venue and choice of law provisions to be included in the individual employment contracts played important roles in those negotiations.

Association member vessels routinely visit ports throughout the world. By establishing in advance what laws will govern the employment relationship and where disputes arising pursuant to that relationship may be heard, choice of law provisions and forum selection clauses in seamen employment contracts put all parties on notice as to their respective rights and responsibilities. Disregarding forum selection clauses and haphazardly subjecting shipowners to jurisdiction wherever their vessels may be found on matters entirely unrelated to the vessel's presence in those locations infuses a great deal of legal uncertainty into the shipping industry and places an unnecessary burden on international commerce. The decision of the Louisiana Fourth Circuit Court of Appeals, which tests the enforceability of a forum selection clause on the degree to which the individual seaman was privy to the negotiations which resulted in its inclusion in a standard employment contract instead of the fairness and reasonableness of the terms of the provision itself, abrogates the usefulness of these provisions.

Because the Association played a leading role in the negotiations leading to the development of the employment contracts at issue in this case, it is able to shed light on the importance which forum selection clauses played in those negotiations, which highlights the importance of these provisions to the shipping industry and its associated labor interests. Because Association member vessels are extensively engaged in international commerce and routinely visit ports around the world, the Association is positioned to shed light on the negative effect the ruling of the Louisiana Fourth Circuit Court of Appeals has on the international shipping trade.

Respectfully submitted,

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INTEREST OF THE NORWEGIAN SHIPOWNER'S ASSOCIATION[1]

The Norwegian Shipowners' Association is a trade group that represents 192 Shipowners operating 730 vessels on trade routes throughout the world. Over 48,000 foreign seamen are employed on vessels registered with the Association. A chief function of the Association is to negotiate wages and terms for employment contracts through collective bargaining agreements between shipowner members and the various labor organizations and governmental entities controlling the employment of these foreign seamen. The collective bargaining agreement and associated employment contracts at issue in this case were the product of extensive negotiation between various Philippine and Norwegian interests, including the Association. Similar agreements exist with Polish, Russian, Indonesian, Pakistani, Central and South American, and Chinese labor interests. The venue and choice of law provisions to be included in the individual employment contracts played important roles in those negotiations.

Association member vessels routinely visit ports throughout the world. By establishing in advance what laws will govern the employment relationship and where disputes arising pursuant to that relationship may be heard, choice of law provisions and forum selection clauses in seamen employment contracts put all parties on notice as to their respective rights and responsibilities. Disregarding forum

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1. No counsel for either party has authored this brief in whole or in part. No party other than the *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. This statement is made in compliance with Supreme Court Rule 37(6).

selection clauses and haphazardly subjecting shipowners to jurisdiction wherever their vessels may be found on matters entirely unrelated to the vessel's presence in those locations infuses a great deal of legal uncertainty into the shipping industry and places an unnecessary burden on international commerce. The decision of the Louisiana Fourth Circuit Court of Appeals, which tests the enforceability of a forum selection clause on the degree to which the individual seaman was privy to the negotiations which resulted in its inclusion in a standard employment contract instead of the fairness and reasonableness of the terms of the provision itself, abrogates the usefulness of these provisions.

SUMMARY OF THE ARGUMENT

Enforceable forum selection clauses play a vital role in international maritime commerce. These contractual mechanisms reduce the array of jurisdictions and laws to which a shipowner would otherwise be subjected on a routine basis. By clearly establishing where parties may sue to assert their rights, these clauses reduce legal expenses, protect litigants' rights, and conserve judicial resources. Both the shipowners and seamen benefit from the resultant cost savings and increased certainty. By declaring that a forum selection clause was invalid because its inclusion in an employment contract had not been negotiated for by an individual seaman, and was therefore "overreaching, unreasonable, and unjust," the Louisiana Fourth Circuit's decision conflicts with this Court's holding in *Carnival Cruise Lines v. Shute*, 499 U.S. 586 (1991), and the Fifth Circuit Court of Appeals' decision in *Marinechance Shipping, Ltd. v. Sebastion*, 143 F.3d 216 (5th Cir. 1998).

ARGUMENT

1.

FORUM SELECTION CLAUSES ARE AN INDISPENSABLE ELEMENT OF MODERN INTERNATIONAL MARITIME COMMERCE.

Three overarching policy reasons have led courts uniformly to recognize that forum selection clauses are an indispensable element of modern international maritime commerce and to enforce these clauses as a matter of course. First, in the absence of such contractual mechanisms, the nature of international maritime commerce would subject shippers to an endless variety of foreign fora and laws according to the vagaries of chance rather than the particular jurisdiction's actual interest in resolution of the dispute. *Carnival Cruise Lines v. Shute*, 499 U.S. 586, 593-94 (1991). Second, establishing in advance where disputes may be tried dispels any confusion as to where and under what laws the parties may seek to enforce their rights. This in turn lessens the threat that a litigant's rights may prescribe or otherwise be lost before an appropriate forum is found, and conserves judicial resources. *Id.* Finally, both parties to the contract stand to benefit from the anticipated resultant cost savings. *Id.*

For these reasons, the seminal decision *The Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 15 (1972), held that forum selection clauses are presumed to be valid and enforceable in admiralty. In *The Bremen*, the Court enforced a forum selection clause contained in a contract for the towage of an offshore platform from the Mediterranean Sea to the Gulf of Mexico. *Id.* at 2. The Court held that a forum selection

clause should only be disregarded on a clear showing "that trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." *Id.* at 18.

The Court further clarified the favored status of these clauses in *Carnival Cruise Lines v. Shute*. *Shute* concerned enforcement of a forum selection clause printed on the back of a passenger's ticket. *Shute*, 499 U.S. at 587. *Shute* expanded the enforceability of these provisions to encompass contracts between corporations and relatively unsophisticated individuals. *Id.* at 593. The passenger had no bargaining power and had not negotiated the terms of her ticket. *Id.* The passenger's option was either to accept the provision or not take the cruise. *Id.* at 595. Nevertheless, the clause was not unfair or unjust and the passenger as well as the shipowner derived certain benefits from its inclusion. *Id.* at 593-94. The Court emphasized that a litigant who seeks to avoid a forum selection clause bears a "heavy burden of proof." *Id.* at 595.

Following *Shute*, the United State Fifth Circuit Court of Appeals considered the same issues and enforced forum selection clauses in the context of employment contracts for foreign seamen. *Marinechance Shipping, Ltd. v. Sebastion*, 143 F.3d 216 (5th Cir. 1998). The Fifth Circuit noticed striking similarities between the employment contracts executed by the seamen in the case before it and the contract for carriage at issue in *Shute*. *Id.* at 221. The court held that the forum selection clauses in the employment contracts were fair and reasonable and that the seamen as well as the shipowner benefited from their

inclusion. *Id.* Ironically, the very same employment contracts which *Marinechance* held valid and enforceable have been abrogated by the decision below.

II.

WITHOUT ENFORCEABLE FORUM SELECTION CLAUSES, SHIPPERS WOULD BE ROUTINELY SUBJECT TO SUIT IN A BEWILDERING ARRAY OF FOREIGN JURISDICTIONS.

Without enforceable forum selection clauses, shipowners would be subject to suit in a bewildering array of foreign fora, all applying different laws and remedies. "Ocean-going vessels travel through many jurisdictions, and could become subject to the laws of a particular jurisdiction based solely upon the fortuitous event of an accident." *Marinechance*, 143 F.3d at 220. As the Court stated in *The Bremen*:

> Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where [the vessel or shipowner] happen to be found. The elimination of all such uncertainties by agreeing in advance is an indispensable element in international trade, commerce, and contracting.

The Bremen, 407 U.S. at 13-14. The Court went on to state that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be put aside." *Id.* at 15.

The present case is typical of the problem facing shipowners. The plaintiff, a Philippine citizen, was injured on a Norwegian vessel on a voyage that began in Cayos Arcus, Mexico, and ended in Ft. Mifflin, Pennsylvania, in an accident in international waters off the coast of Cuba. The plaintiff was evacuated to Key West for treatment. Thus, aspects of the voyage and accident involved contacts with Florida, Pennsylvania, Mexico, Norway, and the Philippines. Yet none of even those disparate locations ultimately served as the forum for the dispute. The plaintiff sued the shipowner in Point-a-la-Hache, Louisiana, a place whose only connection to the whole affair was that another unrelated vessel owned by the shipowner happened by chance to be subject to non-resident attachment in Plaquemines Parish.

As *The Bremen* and *Shute* recognize, this is precisely the situation that forum selection clauses legitimately seek to avoid. A shipowner has been subjected to trial in a remote jurisdiction whose sole connection to the dispute is that an unrelated vessel owned by the shipowner happened to be found there. As stated at the outset, Association member vessels routinely visit ports throughout the world. Disregarding forum selection clauses and haphazardly subjecting shipowners to jurisdiction wherever their vessels may be found on matters entirely unrelated to the vessel's presence in those locations infuses a great deal of legal uncertainty into the shipping industry and places a tremendous burden on international commerce.

III.

BY ALLOWING PARTIES TO ESTABLISH EX ANTE REASONABLE VENUES FOR RESOLUTIONS OF DISPUTES, FORUM SELECTION CLAUSES REDUCE LEGAL UNCERTAINTIES INHERENT TO INTERNATIONAL TRADE.

Forum selection clauses remove uncertainty concerning the resolution of disputes. They delineate where seamen may sue to enforce their rights and where shipowners may be subject to suit. The resulting increased certainty inures to the benefit of both shipowners and seamen. "The selection of a forum in advance reduces the vessel owner's exposure to suits in forums all over the world. Furthermore, it informs the seamen of where their causes of action may be maintained." *Marinechance*, 143 F.3d at 221. Additionally, by establishing in advance the proper venue for litigation, forum selection clauses act to preserve litigants' rights, reduce legal expenses, and conserve judicial resources. Forum selection clauses have "the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing the litigants time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions." *Shute*, 499 U.S. at 593-94.

IV.

THE VENUE PROVISIONS AT ISSUE IN THIS CASE WERE THE PRODUCT OF EXTENSIVE NEGOTIATION WITH PHILIPPINE GOVERNMENT AND LABOR ORGANIZATIONS.

The forum selection provisions at issue in this case were the product of extensive negotiations. They should not be lightly disregarded. These negotiations were conducted between the Norwegian Shipowners' Association, Norwegian labor unions, and The Associated Marine Officers' and Seamen's Union of the Philippines ("AMOSUP"). AMOSUP is a Philippine seamen's labor organization. The resulting collective bargaining agreement was submitted to and approved by the Philippine Overseas Employment Administration ("POEA"). The POEA is the Philippine government agency which controls the foreign employment of Philippine citizens.[2]

During these negotiations, Norwegian shipowners and labor interests took the position that Norwegian laws should control and that Norway should be the designated forum for any disputes arising out of the employment. Norwegian law allows a seaman to sue a shipowner either in the seaman's home country or in Norway. *Norwegian International Ship Register Act*, § 6. [Appendix A] Additionally, if in a foreign port, a seaman may bring his

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2. As Judge Wisdom noted in *Marinechance*, "[t]he effect of POEA intervention is to shift the balance of power slightly in favor of the employee in much the same way that a labor union or legislative enactment of minimum work standards increases the level of protection for employees in the United States." *Marinechance*, 143 F.3d at 221 n.25.

action before the local Norwegian consulate. *Norwegian Seamen's Act*, § 50. [Appendix B] The consulate has the authority to enter a binding decision subject to appeal to a court of competent jurisdiction. *Id.* In no event may the suit be brought before foreign authorities. *Id.* [3]

The Philippine interests, however, were insistent that venue should be designated in the Philippines. After considerable negotiation it was concluded that seamen would be allowed to sue in either venue. It is worth noting that the POEA reviews and approves each contract for overseas employment to ensure compliance with this venue requirement. *Marinechance*, 143 F.3d at 219.

Additionally, the negotiations for the inclusion of these forum selection provisions were closely tied to the provisions concerning the wages and benefits to be provided the seamen, including cadets such as Mr. Valdez. Restricting the number of venues in which a shipowner can be sued for matters arising out of a seaman's employment is thus an integral part of any employment bargain. The Fourth Circuit's decision that the forum selection provision in these employment contracts are not worthy of enforcement clashes with the Norwegian shipowners bargained-for right to a degree of certainty about where they can be sued by their employees.

The first collective bargaining agreement was executed in 1987. It has since been renegotiated every two years. The POEA has been consulted during each negotiation, and

3. Thus, in addition to the provisions of his employment contract, a seaman aboard a Norwegian vessel is limited under Norwegian law to bringing suit against his employer either in Norway or his home country.

has approved each subsequent agreement. The salient features of the agreement will soon be memorialized in a formal treaty between the Philippines and Norway. The treaty been approved by each country's respective ministries[4] and is expected to be reviewed by legislative authorities and signed shortly. The treaty contains the same venue requirements, now long honored by both countries, which the Louisiana Fourth Circuit Court of Appeals refuses to enforce. [Appendix C]

V.

BY PROVIDING PROPER VENUE IN EITHER THE PHILIPPINES OR NORWAY, THE FORUM SELECTION CLAUSES AT ISSUE IN THIS DISPUTE ARE INHERENTLY REASONABLE.

Finally, the forum selection clauses at issue here are inherently fair and reasonable. As stated earlier, these are the very same provisions which the Fifth Circuit enforced in *Marinechance*. Indeed, considering that a seaman's employment aboard an ocean-going ship will likely take the seaman to various locations around the globe, a forum selection provision which allows the seaman to sue the

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4. Participating in the negotiations were the Norwegian Ambassador to the Philippines and representatives from the Norwegian Ministry of Trade and Industry, the Norwegian Shipowners Association, the Philippine Maritime Industry Authority, the Philippine Department of Foreign Affairs, the Philippine Shippers' Bureau, the Philippine National Economic Development Authority, the POEA, the Philippine Department of Transportation and Communications, the Philippine Ports Authority, the Philippine Bureau of Customs, and the Philippine Bureau of Immigration.

shipowner in the seaman's home country is *a fortiori* reasonable. It gives the seaman the right to have any dispute concerning his employment adjudicated in a friendly forum. Although such forum selection clauses may require that seamen forego the opportunity to forum shop, the question of whether a higher verdict might be obtained elsewhere is simply not a basis for declining enforcement. The seaman exchanges his opportunity to forum shop at the outset for a guaranteed convenient and amenable forum as well as enhanced employment opportunities with increased benefits and wages that are substantially above the norm in the Philippines.

CONCLUSION

Amicus curiae respectfully submits that the Court should grant the writ and reverse the Louisiana Fourth Circuit Court of Appeal's decision, and affirm the validity and enforceability of forum selection in foreign seamen's employment contracts.

Respectfully submitted,

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